

NOT FOR PUBLICATION

In the
United States Court of Appeals
For the Eleventh Circuit

No. 25-10404
Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TAVARES BENDER,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:24-cr-20219-CMA-1

Before LUCK, LAGOA, and TJOFLAT, Circuit Judges.

PER CURIAM:

Tavares Bender appeals his conviction and 125-month sentence for one count of possession of a firearm and ammunition by

a convicted felon. Bender raises three issues on appeal. First, he argues that the District Court plainly erred in admitting his prior felon-in-possession conviction under Federal Rule of Evidence (“Rule”) 404(b). Next, he argues that the court abused its discretion in denying his motion for a mistrial. Finally, he argues his sentence was substantively unreasonable because the District Court relied solely on his criminal history and did not consider his mitigating evidence.

We affirm.

I. ADMISSION OF BENDER’S PRIOR CONVICTION

Bender argues the District Court improperly admitted evidence of his prior conviction for possession of a firearm by a convicted felon. He contends the disclosure was inadmissible propensity evidence under Rule 404(b) and argues the risk of unfair prejudice substantially outweighed any probative value under Rule 403. We find the District Court properly admitted evidence of Bender’s prior conviction for possession of a firearm by a convicted felon because, by refusing to admit or enter a stipulation he knowingly possessed the firearm found by law enforcement, he placed the element of his knowing possession at issue. Additionally, the evidence of Bender’s prior conviction was properly admitted and any potential prejudice to Bender was mitigated by the District Court’s limiting instruction. Therefore, the District Court did not abuse its discretion by admitting Bender’s prior conviction.

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“We review a district court’s admission of prior crimes or bad acts under Rule 404(b) for abuse of discretion.” *United States v. Ramirez*, 426 F.3d 1344, 1354 (11th Cir. 2005). Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial . . . of the general nature of any such evidence it intends to introduce at trial.

We recognize a three-part test to determine whether evidence is admissible under Rule 404(b): (1) the evidence must be relevant to an issue other than the defendant’s character; (2) there must be sufficient proof that a jury could find by a preponderance of the evidence that the defendant committed the act; and (3) the probative value of the evidence must not be substantially outweighed by undue prejudice under Rule 403. *United States v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007).

A. Relevance

Evidence of Bender’s prior conviction is relevant to the “knowledge” element of the 18 U.S.C. § 922(g) charge at issue. Bender never admitted to or stipulated to the fact he knowingly possessed the firearm found by law enforcement. Thus, the govern-

ment had the burden of proving knowing possession of the firearm. *United States v. Taylor*, 417 F.3d 1176, 1182 (11th Cir. 2005). To meet this burden and satisfy the mens rea element of the offense, the government sought admission of evidence Bender had knowingly possessed a firearm at another time. *See id.* “Where the extrinsic offense is offered to prove intent, its relevance is determined by comparing the defendant’s state of mind in perpetrating both the extrinsic and charged offenses.” *Edouard*, 485 F.3d at 1345. Here, as in *Edouard*, the first prong of the Rule 404(b) test is satisfied because “the state of mind required for the charged and extrinsic offenses is the same.” *Id.*

B. Proof

The “proof” requirement under 404(b) is undisputed. The government plainly satisfied its proof requirement when it admitted a copy of Bender’s prior conviction for possession of a firearm by a convicted felon.

C. Potential Rule 403 Exclusion

The risk of unfair prejudice in admitting Bender’s prior conviction did not substantially outweigh the prior conviction’s legitimate probative value. This step of our 404(b) analysis incorporates Rule 403. *Huddleston v. United States*, 485 U.S. 681, 688, 108 S. Ct. 1496, 1500 (1988). Rule 403 provides that a “court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or

needlessly presenting cumulative evidence.” Fed. R. Evid. 403. “Rule 403 is an extraordinary remedy which the district court should invoke sparingly, and the balance should be struck in favor of admissibility.” *United States v. Lopez*, 649 F.3d 1222, 1247 (11th Cir. 2011) (citation omitted). “In reviewing issues under Rule 403, we look at the evidence in a light most favorable to its admission, maximizing its probative value and minimizing its undue prejudicial impact.” *United States v. Dodds*, 347 F.3d 893, 896 (11th Cir. 2003) (citation modified). “Unfair prejudice” means “an undue tendency to suggest decision on an improper basis.” *United States v. Kent*, 93 F.4th 1213, 1220 (11th Cir. 2024).

Whether the probative value of Rule 404(b) evidence outweighs its prejudicial effect depends on the circumstances of the extrinsic offense. *Edouard*, 485 F.3d at 1345 (quoting *United States v. Dorsey*, 819 F.2d 1055, 1061 (11th Cir. 1987)). We consider factors such as “the strength of the government’s case on the issue of intent, the overall similarity of the extrinsic and charged offenses, the amount of time separating the extrinsic and charged offenses and whether it appeared at the commencement of trial that the defendant would contest the issue of intent.” *Dorsey*, 819 F.2d at 1061.

Several factors favor admissibility here. As discussed above, Bender pleaded not guilty to the charged offense, making the issue of intent a contested issue. The extrinsic and charged offenses are similar because the state of mind required for each offense is the same. The extrinsic evidence is also relatively recent—Bender was convicted on the felon-in-possession charge in 2022. Moreover,

“the government’s proof of intent at trial was not so overwhelming as to render the extrinsic offense evidence merely cumulative” because the government’s body-camera footage did not actually show law enforcement removing the gun from Bender. *See Dorsey*, 819 F.2d at 1061. Under these circumstances, the District Court did not abuse its discretion in admitting evidence of Bender’s prior conviction.

II. BENDER’S MOTION FOR A MISTRIAL

Nor did the District Court abuse its discretion in denying Bender’s motion for a mistrial. On appeal, Bender raises two issues regarding his motion. First, Bender argues that the district court erred in denying his motion for mistrial after the prosecutor commented on Bender’s silence following his arrest. Second, Bender argues the prosecutor’s comments during closing arguments impermissibly shifted the burden of proof, and the District Court’s limiting instruction for the jury to “disregard [the prosecutor’s] comment in its entirety” failed to cure the prejudice generated by the prosecutor’s comments. We reject both arguments.

The facts before us are made clear by the record. In her rebuttal closing argument, the prosecutor made the following remarks:

[The detectives] came in here and testified to you that when they were with Mr. Bender, Mr. Bender said to them too, I have a gun on me. He said I have a gun on me and then they took a round in that firearm out of his pockets. And is it reasonable that—is it reasonable

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to think that that gun didn't come off of Mr. Bender watching this video, looking at Mr. Bender's demeanor, how he is behaving? Is he saying, can you see him reacting in any way, do you hear him say anything, like, that's not my gun? Do you see him shaking his—

At that point, Bender objected to “comments on silence and emotion.” The District Court sustained the objection. The prosecutor continued:

Do you see him shaking his head at all in the body-worn camera, in response to what the officers are doing? No. He is calm, he's collected, he's cool because he knows what's happened.

After the government's argument, and outside the jury's presence, Bender moved for a mistrial. The District Court noted it had sustained his objection and summarily denied his motion.

After the jury re-entered, the Court instructed the jury that “it must decide whether the Government has proved the specific facts necessary to find the Defendant guilty beyond a reasonable doubt.” It further explained:

The indictment or formal charge against a defendant is not evidence of guilt. The law presumes every defendant is innocent. The defendant does not have to prove his innocence or produce any evidence at all. The government must prove guilt beyond a reasonable doubt, if it fails to do so, you must find the Defendant not guilty.

Furthermore, the Defendant does not have to testify and you cannot consider in any way the fact that Defendant did not testify. . . .

The Government's burden of proof is heavy, but it does not have to prove a defendant's guilt beyond all possible doubt. The government's proof only has to exclude any reasonable doubt concerning the Defendant's guilt.

The Court explained the definition of reasonable doubt and that the jury must consider all evidence admitted at trial. Although Bender did not ask for a curative instruction following the prosecutor's comments, the Court provided one:

The prosecutor made a reference in her closing remarks, who you don't see on the video, the Defendant saying no or shaking his head no – during the incident that you saw in the video on the body-worn camera. I sustained the objection that Defense Counsel raised so please disregard that comment in its entirety.

With the facts before us, we now address Bender's arguments on appeal.

"A district court's decision not to grant a mistrial on the basis of comments regarding a defendant's choice to remain silent is reviewable for abuse of discretion." *United States v. Wilchcombe*, 838 F.3d 1179, 1190 (11th Cir. 2016).

Under binding Eleventh Circuit precedent, "[w]e permit the prosecution to use a defendant's post-arrest, pre-*Miranda* silence as direct evidence that may tend to prove the guilt of the defendant."

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Id. (quoting *United States v. Rivera*, 944 F.2d 1563, 1568 (11th Cir. 1991)).¹ Finding *Wilchcombe* on point, we cannot conclude the District Court abused its discretion by denying Bender’s motion for a mistrial based on the prosecutor’s comments.

Bender next argues that the prosecutor’s comments impermissibly shifted the burden of proof, and the District Court’s limiting instruction failed to cure the prejudice generated by the prosecutor’s comments. Prosecutorial misconduct during closing argument, such as an improper burden-shifting argument, requires a new trial only where the remarks were improper and prejudiced the defendant’s substantial rights. *United States v. Paul*, 175 F.3d 906,

¹ Bender’s brief correctly identifies a long-standing circuit split as to when the government may comment on a defendant’s silence. As we discussed in *Wilchcombe*,

The First, Second, Sixth, and Seventh Circuits prohibit the use of even pre-arrest silence as substantive evidence of guilt. The Ninth, Tenth, and D.C. Circuits prohibit the use of post-arrest, pre-*Miranda* silence as substantive evidence of guilt. In addition to the Eleventh Circuit, the Fourth and Eighth Circuits permit the government to comment on a defendant’s silence at any time prior to the issuance of *Miranda* warnings.

Although the Supreme Court once granted certiorari to resolve this question, the Court ultimately decided the case on other grounds, leaving the circuit split in place. [*Salinas v. Texas*, 570 U.S. 178, 183, 133 S. Ct. 2174, 2179, (2013).]

838 F.3d at 1190. Today, we reiterate *Wilchcombe*’s holding: “[w]hatever the state of the law in other circuits, in our circuit it [is] permissible for the government to comment on [the defendant’s] silence.” *Id.* at 1191.

912 (11th Cir. 1999). To assess the prejudicial impact of the comments, we evaluate them in the context of the trial as a whole and assess their probable impact on the jury. *United States v. Hernandez*, 145 F.3d 1433, 1439 (11th Cir. 1998). Any potential prejudice regarding burden-shifting is diminished by the court’s explicit instructions regarding the burden of proof in the jury charge. *Id.*

We find that the court’s lengthy instruction on the burden of proof and its warning that the jury could not consider the government’s comments eliminated any risk of prejudice concerning burden-shifting. *See Hernandez*, 145 F.3d at 1439.

Accordingly, we affirm the District Court’s denial of Bender’s motion for a mistrial.

III. SENTENCING

Finally, Bender argues his 125-month sentence was substantively unreasonable because the District Court relied solely on his criminal history and disregarded his mitigating circumstances.

When reviewing a sentence for substantive reasonableness, we consider the totality of the circumstances under an abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 597 (2007). The district court abuses its discretion when it: “(1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors.” *United States v. Rodriguez*, 34 F.4th 961, 969

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(11th Cir. 2022). We will only vacate a sentence if, after our analysis, “we are left with a definite and firm conviction that the district court committed a clear error of judgment.” *United States v. Irey*, 612 F.3d 1160, 1190 (11th Cir. 2010) (internal quotation marks omitted).

The District Court held a sentencing hearing on January 27, 2025. At the hearing, it considered “the information in the Presentence Investigation Report,” “the parties memoranda,” and “the relevant statutory factors under 18 U.S.C. § 3553(a).” According to the presentence investigation report, Bender’s advisory guidelines range was 100 to 125 months’ imprisonment. After hearing arguments from both parties, the Court imposed a top-of-the-guidelines sentence of 125 months’ imprisonment. It reasoned that “specific deterrence [was] a key sentencing consideration pertaining to Mr. Bender given his significant criminal history.”

The District Court’s emphasis on Bender’s criminal history does not, as Bender argues, evince an improper disregard for his mitigating circumstances. Indeed, the District Court was “permitted to attach great weight to one factor over others.” *United States v. Rosales-Bruno*, 789 F.3d 1249, 1254 (11th Cir. 2015) (quoting *Gall*, 552 U.S. at 57, 128 S. Ct. at 600). Instead, the District Court explicitly mentioned “[Bender’s] history and character” as a relevant factor in reaching its conclusion.

Thus, the record shows the District Court considered the proper § 3553(a) factors and gave fair consideration to Bender's mitigating circumstances. Bender's argument that the Court erred in its consideration of the sentencing factors fails.

IV. CONCLUSION

For the foregoing reasons, we affirm Bender's conviction and sentence.

AFFIRMED.